Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

MICHAEL-F. CRAIG, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a harmless beyond a reasonable doubt analysis applies to a violation of an appellant's right to a speedy post-trial appeal, which is recognized as a constitutional due process right and is tested under an analysis that already includes the element of prejudice derived from *Barker v. Wingo*, 407 U.S. 514 (1972).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Staff Sergeant Michael F. Craig, United States Marine Corps (USMC), Lance Corporal Cameron D. Boles, USMC, Aviation Machinist's Mate First Class Charles M. Bricker, United States Navy (USN), Chief Fire Controlman Salvador Diaz, USN, Hull Maintenance Technician Leonard Y. Duran, USN, Builder Second Class Christopher B. Durfee, USN, Machinist's Mate Second Class Tyrone J. Forney, USN, Ship's Serviceman Third Class Vincent Francois, USN, Fireman Controlman Second Class David A. Gaines, USN, Lance Corporal Timothy G. Gilmore, USMC, Sergeant Christopher L. Harris, USMC, Corporal William R. Humphrey, USMC, Quartermaster Third Class Troy B. Jenkins, USN, Corporal Damon G. Johnson II, USMC, Fireman Joseph R. Kamely, USN, Lance Corporal John W. Leger II, USMC, Staff Sergeant Christopher M. Lucas, USMC, Captain Scott R. McClelland, Medical Corps, USN, Aviation Boatswain's Mate Franklin Owens, Jr., USN, Lance Corporal Jason A. Phillips, USMC, Quartermaster First Class Trent T. Pritchett, USN, Staff Storekeeper Third Class Aaron T. Ruggs, USN, Gunner's Mate (Missiles) Seaman Apprentice Lori L. Spencer, USN, Dental Technician First Class Columbia R. Shiloh, USN, Major Wayne D. Szymczyk, USMC, Lance Corporal Jeremy D. Thompson, USMC, Aviation Structural Mechanic Airman Apprentice Michael G. Tilman, USN, Fire Control Technician Third Class Michael A. White, USN, and Lance Corporal Kykaiya A. Williams, USMC

LIST OF PARTIES - Continued

were individual appellants in the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces. The Respondent is the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS AND ORDERS BELOW

The orders of the Court of Appeals for the Armed Forces are reproduced in the appendix (App. 1*a*-453*a*) and have not yet been reported. With the exception of two cases, the opinions of the Navy-Marine Corps Court of Criminal Appeals (App. 3*a*-455*a*) are unreported and are reproduced in the appendix. The two reported opinions are *United States v. Gaines*, 61 M.J. 689 (N-M. Ct. Crim. App. 2005) and *United States v. Jenkins*, 62 M.J. 582 (N-M. Ct. Crim. App. 2005), which appear respectively at App. 134*a* and App. 184*a*.

JURISDICTION

The lower court granted review of Petitioners' cases and affirmed their convictions on various dates from September 11, 2006 to October 20, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1259(3). Petitioners invoked the jurisdiction of the Court of Appeals for the Armed Forces under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3). The Navy-Marine Corps Court of Criminal Appeals had jurisdiction over their cases pursuant to automatic appeals under Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law ....

Article 66 (c), UCMJ, is set forth at App. 476*a*.

PRELIMINARY STATEMENT

The Court of Appeals for the Armed Forces (CAAF) assumed a statutory and constitutional due process violation in each Petitioner's right to a speedy post-trial appeal, but declined to grant a remedy because the violations were harmless beyond a reasonable doubt. This Court has never addressed whether a constitutional violation of an appellant's right to a speedy appeal can be rendered harmless beyond a reasonable doubt. In *Chapman v. California*, 386 U.S. 18 (1967), this Court applied the harmless-error doctrine to a constitutional violation by testing whether the error was harmless beyond a reasonable doubt. *Id.* at 24. But no district or Circuit Court of Appeals has ever applied that doctrine to constitutional violations of a right to a speedy post-trial appeal. The CAAF is the only federal court to use the harmless beyond a reasonable doubt standard in evaluating a speedy post-trial due process violation. The application of the doctrine by the CAAF

presents a departure from the jurisprudence of appellate courts and creates an unsettled issue in law that Petitioners respectfully ask this Court to resolve.

STATEMENT

The twenty-nine named Petitioners suffered excessive post-trial delays on their automatic appeals to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) ranging from two years, two months to seven years, two months. Seventeen of the twenty-nine Petitioners experienced post-trial delay in excess of four years. Petitioners represent a small fraction of the appellants who experienced post-trial appellate delays during the years 2001 to 2004. The nature of Petitioners' delays range from the post-trial processing that occurred before a case was docketed with the NMMCA to delays that occurred after a case was docketed.

1. Post-Trial Delay In The Naval Service.

The CAAF identified understaffing of appellate defense attorneys as the root cause of post-trial delay at the NMCCA post-docketing level. As early as 2000, it noted the chronic understaffing of the Navy-Marine Corps Appellate Defense Division. *United States v. Lynn*, 54 M.J. 202 n.11 (C.A.A.F. 2000).

In 2003, the CAAF granted review of a *pro se* extraordinary writ filed by an appellant desperate to have his case briefed. *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34 (C.A.A.F. 2003) (one of the named

Petitioners). The CAAF explicitly recognized the understaffing of appellate defense attorneys and placed the responsibility to ensure timely appeals on both the Government and the NMCCA. *Id.* at 38.

The reasons for the occurrence of post-trial delay before a case was docketed with the NMCCA were harder to identify because delay could not be attributed to a single root cause. Nevertheless, the CAAF was aware that this form of post-trial delay was systemic, and in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) the CAAF, expressing its exhaustion with the issue, outlined rigid time standards for processing an appellant's appeal both before and after it arrived at the appellate service courts. *Id.* at 142.

Unfortunately for Petitioners, *Moreno* came too late to affect their cases. After suffering extreme delays, their only recourse was to show that delay in their cases amounted to a constitutional and statutory due process violation necessitating a remedy.

2. The Analysis of Post-Trial Delay Under The Constitution.

While this Court has not yet addressed the issue of whether an appellant has a constitutional due process right to a speedy appeal, most federal courts have found that such a right does exist within the Constitution's Due Process Clause. *See e.g., United States v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996). The language most frequently relied upon has been this Court's decision in

Evitts v. Lucey, 469 U.S. 387, 393 (1985) finding that where an appeal is an integral part of final adjudication, appellate procedures must comport with the demands of due process.

Consistent with the federal appellate courts, the CAAF recognizes that an appellant is entitled to timely appellate review, and identifies both "statutory and constitutional roots" to this right under Article 66, UCMJ and the Due Process Clause. *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) (*Toohey I)* (citing *Diaz*, 59 M.J. at 37-38). The constitutional post-trial speedy appeal test adopted by the CAAF, and used in Petitioners' cases, is a four-factor test determining: 1) the length of delay, 2) reasons for the delay, 3) the assertion of right to a timely appeal, and 4) prejudice. *Toohey I*, 60 M.J. at 102. The four-factors are derived from this Court's test for violation of speedy trial rights in *Barker v. Wingo*, 407 U.S. 514 (1972). The CAAF adopted the four factors in explicit conformance with tests applied by a majority of Circuit Courts of Appeals. *Toohey I*, 60 M.J. at 102. Also, consistent with other federal appellate courts, the CAAF adopted modifications to the *Barker* factor used for establishing prejudice. An appellant could prove prejudice by showing that his incarceration was oppressive, that the delay caused anxiety or concern, or that his case was impaired due to a lengthy appeal. *Moreno*, 63 M.J. at 138-39.

3. The Orders Of The Court Of Appeals For The Armed Forces.

From September 11, 2006 to October 20, 2006, the CAAF issued orders in Petitioners' cases, resolving the issue of post-trial appellate delay against them. The CAAF's orders were not based on Petitioners' failure under the *Barker* derived analysis. Instead, it was based on its decision in *United States v. Allison*, 65 M.J. 365 (C.A.A.F. 2006) which had added a novel analysis to post-trial delay cases. In *Allison*, the CAAF held that "in cases involving claims that an appellant has been denied his due process right to speedy post-trial review and appeal, we may look initially to whether the denial of due process, if any, is harmless beyond a reasonable doubt." *Id.* at 370-71.

In all of the Petitioners' orders, the CAAF assumed that a post-trial delay constitutional due process violation had occurred, but found every violation harmless beyond a reasonable doubt. These orders therefore grant Petitioners a hollow victory for a due process violation per the accepted test adopted by the majority of Courts of Appeals. It denies any remedy by adhering to a second layer of analysis that has not been applied by any other court.

REASONS FOR GRANTING THE PETITION

I. THE APPLICATION OF THE HARMLESS ERROR DOCTRINE TO A POST-TRIAL DELAY CONSTITUTIONAL DUE PROCESS VIOLATION IS INCONSISTENT WITH THE PRIOR APPLICATION OF THE HARMLESS ERROR DOCTRINE BY THIS COURT AND INCONSISTENT WITH THE ACCEPTED TEST DEVELOPED TO COMBAT POST-TRIAL DELAY.

The practical effect of implementing a "re-test" for harm is that an appellant's right to a speedy appeal is withered into something less than an enforceable right that must comport with due process concerns. The CAAF has applied the harmless error doctrine inconsistently into an analysis that already considers harm. The CAAF's application of the harmless error doctrine is inconsistent in three ways: 1) it is contrary to how federal courts approach a post-trial delay analysis, 2) it is contrary to how this Court has applied the harmless error doctrine, and 3) it fails to alleviate the appearance of injustice where inordinate delay has occurred.

A. The Adoption Of A Test By Federal Courts To Determine Whether A Due Process Violation Has Occurred Based Upon Post-Trial Delay.

An appeal is a critical component of a criminal justice system because it ensures both the accuracy and the

legitimacy of the trial court judgment. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); Marc Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437, 496 (1990). Speedy appeals either validate a trial court's findings and provide society with a finality of judgment and deterrence for future offenders, or correct trial level errors and prevent improper convictions or unjust incarceration. *See Peyton v. Rowe*, 391 U.S. 54, 63 (1968); *Arkin*, *supra* at 496.

The United States Constitution does not require that an accused be afforded the right to appeal a criminal conviction. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974) (citing *McKane v. Durston*, 153 U.S. 684, 687-88 (1894)). But despite the absence of a constitutional prescription for an appellate process, this Court has held that when an accused is afforded appellate review of his conviction, that appeal must satisfy federal constitutional due process requirements. *Evitts*, 469 U.S. at 400-01 (citing *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970)); *Griffin*, 351 U.S. at 20; *See also Harris v. Champion*, 15 F.3d 1538, 1558 (10th Cir. 1994).

More specifically, an accused appealing a conviction has a due process right to an "adequate and effective" appellate hearing. *Griffin*, 351 U.S. at 20. Components of an adequate and effective appellate hearing include the right to effective appellate counsel and the right to a timely review of the appeal. *Douglas v. California*, 372 U.S. 353, 358 (1963); *Arkin*, *supra* at 447.

Article 66(b) of the Uniform Code of Military Justice

(UCMJ) gives a service member convicted at a special or general court-martial an appeal-as-of-right to a service Court of Criminal Appeals in cases where the approved sentence extends to either a punitive discharge or confinement for one year or more. 10 U.S.C. § 66(b). Article 67(a), UCMJ requires the Court of Appeals for the Armed Forces to review those appeals: (1) in which the sentence affirmed by the Court of Criminal Appeals extends to death, (2) that the cognizant Judge Advocate General certifies for review, or (3) in which the accused demonstrates "good cause shown." 10 U.S.C. § 67(a).

This Court has never ruled on whether a convicted defendant has a constitutional right to a speedy appeal; however, the Second, Third, Fourth, Fifth and Tenth Circuits, as well as the Court of Appeals for the Armed Forces, have ruled that excessive delays in both state and court-martial post-conviction proceedings violate an accused's right to constitutional due process under the Fifth Amendment. *See Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir. 1980), *cert. denied*, 450 U.S. 931 (1981); *Smith v. Kansas*, 356 F.2d 654, 656-57 (10th Cir. 1966), *cert. denied*, 389 U.S. 871 (1967); *Simmons v. Beyer*, 44 F.3d 1160, 1170-71 (3d Cir. 1995), *cert. denied*, 516 U.S. 905 (1995); *Ward v. Freeman*, 1995 U.S. App. LEXIS 2304, 5 (4th Cir. 1995)(per curiam); *Cody v. Henderson*, 936 F.2d 715, 719 (2d Cir. 1991); *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006) (*Toohey II*); *Diaz*, 59 M.J. at 38.

The First, Sixth, Seventh, Eighth and Ninth Circuits have also held that an accused has a constitutional due

process right to a speedy appeal, but they have not found a due process violation in cases they have considered. *See United States v. Smith*, 94 F.3d 204, 206 (6th Cir. 1996), *cert. denied*, 519 U.S. 1133 (1997); *United States v. Hawkins*, 78 F.3d 348, 350 (8th Cir. 1996), *cert. denied*, 519 U.S. 844 (1996); *Allen v. Duckworth*, 6 F.3d 458, 459 (7th Cir. 1993), *cert. denied*, 510 U.S. 1132 (1994); *United States v. DeLeon*, 444 F.3d 41, 43-44 (1st Cir. 2006); *United States v. Mohawk*, 20 F.3d 1480, 1485 (9th Cir. 1994).

The Fifth Circuit's decision in *Rheuark v. Shaw* is particularly significant because it is the first holding to define the right to a speedy appeal by adopting the four *Barker v. Wingo* factors used to measure whether an accused has been given a speedy trial under the Sixth Amendment. *Rheuark*, 628 F.2d at 303 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)); *Arkin*, *supra* at 471-72, 481. Under the *Barker* test, four factors are weighed on an ad hoc basis: the amount of delay, the reason(s) for the delay, the accused's assertion of the right, and the existence of prejudice to the accused. *Rheuark*, 628 F.2d at 303 (citing *Barker*, 407 U.S. at 530).

The *Rheuark* Court modified the prejudice prong and held that prejudice in the appellate context should be measured by preventing oppressive incarceration pending appeal, minimizing anxiety and concern pending the outcome of the appeal, limiting the possible impairment of a convicted accused's grounds for appeal, and preventing impairment of the accused's ability to mount a defense in the event of a rehearing or retrial. *Id.*

Once all four *Barker* factors are individually analyzed, the factors are then balanced collectively in determining if a due process violation exists. *Id.; Simmons v. Reynolds*, 898 F.2d 865, 868 (2d Cir. 1990); *Toohey II*, 63 M.J. at 361-62; *Arkin, supra* at 474.

While the existence of prejudice may affect the severity of the violation or selection of the remedy, a finding of prejudice is not necessary to establish a speedy appeal due process violation under the *Barker* derived standard. *Simmons*, 898 F.2d at 868; *Toohey II*, 63 M.J. at 361-62; *Arkin, supra* at 474.

B. The Application Of The Harmless Error Doctrine To Post-Trial Delay Cases.

The CAAF is the only federal appellate court to apply the harmless error doctrine to post-trial delay cases, even after finding that a due process violation can exist without a finding of prejudice under the fourth *Barker* prong. *Toohey II*, 63 M.J. at 363.

In its adjudication of the twenty-nine consolidated appeals before this Court, the CAAF repeatedly found unjustified appellate delay amounting to constitutional due process violations. Even with its findings of repeated due process violations, the CAAF never fashioned a single remedy because it found the constitutional violation in each case harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24.

The CAAF's first use of the harmless error doctrine in a post-trial delay case occurred in *Toohey II*, which was the direct appeal of *Toohey I*, an extraordinary writ appeal that had established the *Barker* derived test for post-trial delay cases in the military. In *Toohey II*, the appellant suffered over six years of post-trial delay and was found by the CAAF to have suffered a constitutional due process violation under the *Barker* derived analysis. *Toohey II*, 63 M.J. at 362. The key aspect of *Toohey II* was that the appellant failed to show prejudice and, therefore, only met three of the *Barker* factors. The CAAF reasoned that because the other three *Barker* factors weighed heavily in favor of the appellant, a conclusion could be reached that the post-trial delay was "egregious." *Id.*

The CAAF's finding of a constitutional due process violation, in the absence of prejudice, resolved the question of whether prejudice should control the post-trial delay analysis – a question prevalent since the courts first adopted the *Barker* derived test. One commentator has stated that although the prejudice factor is useful in a speedy trial analysis to determine whether a defendant is gaming the system for more time, in the appellate delay context there is no such incentive. *Arkin, supra* at 477-79. The prejudice factor in appellate delay analysis invariably prohibits any remedy to violations of an appellant's right to a timely appeal because it is too hard to establish prejudice on appeal. *Id.*

The CAAF's analysis in *Toohey II* allowed for instances where prejudice could not be articulated, but

where inordinate post-trial delay was nevertheless recognized. But the CAAF's excellent analysis then turned sour with its adoption of the harmless error doctrine. *Toohey II*, 63 M.J. at 363. And, although the appellant in *Toohey II* prevailed under the analysis, the damage to how military courts approach post-trial appeal cases was done. Service members, who have suffered post-trial delay, must now undergo two gauntlets of harm analysis before they may be granted a remedy – the *Barker* derived analysis, and the harmless beyond a reasonable doubt analysis.

C. The Inconsistency Of The CAAF's Approach With This Court's Application Of The Harmless Error Doctrine.

The most confounding aspect of the CAAF's use of the harmless error doctrine is that it is applied after a prejudice analysis has already been conducted. Not only does such an application expose an appellant to a more stringent test, it also misapplies the harmless error doctrine. In *Chapman v. California*, this Court recognized that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may ... be deemed harmless." *Chapman*, 386 U.S. at 22. At the same time, the Court stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. The latter cases tend to focus on constitutional violations that reveal a lack of fundamental fairness in the justice system. *See e.g., Arizona v. Fulminante*, 499

U.S. 279 (1991). In *Fulminante*, this Court identified these violations as "structural."

While Petitioners' cases have never been identified as "structural" violations, they have been analogized, conceptually, with cases which are not subject to a harmless error analysis – speedy trial cases. In *Fulminante*, this Court did not mention speedy trial violations within the class of cases that defy harmless error analysis. Yet, it is axiomatic that once a speedy trial violation is found, that violation is not subject to a harmless error analysis. *United States v. Strunk*, 412 U.S. 434 (1973). *Strunk* was decided a year after this Court formulated the *Barker* analysis and, consistent with that analysis, did not bar relief based on the absence of prejudice. *Id.* at 438-39.

In *Strunk*, this Court emphasized the difficulty in curing a speedy trial violation, and that such a violation could not co-exist with a plenary requirement that harm, or harmlessness, be shown. *Id.* at 439. Such concerns also exist in post-trial delay cases, where an appellant's harm is usually tied to whether he can prevail on the substantive issues of his appeal. The lack of a meritorious appeal then becomes a barrier to relief for inordinate post-trial delay. This Court has disallowed such prerequisites to the exercise of a due process right. *See e.g., Draper v. Washington*, 372 U.S. 487, 497-99 (1963) (due process violation where an indigent was required to convince a judge that his appeal was not frivolous in order to receive transcript); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357

U.S. 214, 216 (1958) (per curiam) (due process violation where an indigent was required to convince a judge that justice would be served by his appeal). It follows then that the CAAF's initial decision in *Toohey II* - finding a due process violation because the first three *Barker* derived factors significantly outweighed the lack of prejudice - is consistent with the fair application of a test meant to protect all appellants who have suffered a due process violation. But the CAAF's inexplicable application of the harmless beyond a reasonable doubt analysis to re-test for harm completely undermines the otherwise fair analysis.

Another significant aspect of *Strunk* is that this Court disallowed the application of an element that was already included in the *Barker* analysis. The adoption of the harmless doctrine as second tier to the already established post-trial delay test creates a redundancy and inefficiency in the analysis for prejudice. In the Petitioners' consolidated twenty-nine cases it is unclear how the government showed harmlessness beyond a reasonable doubt. The adoption of the harmless error doctrine to Petitioners' cases only serves to revisit the issue of prejudice, or the lack of it, and isolates that factor alone so that the counterbalancing factors that gave rise to the due process violation become insignificant.

D. Subjecting Petitioners' Cases To A Harmless Error Analysis Does Not Comport With The Judicial Fairness That Due Process Seeks To Achieve.

A basic requirement of due process is that it comport with proper standards of fairness. This Court has stated that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). In instances where the public confidence in the justice system is compromised, this Court has declined to apply the harmless error doctrine. *See e.g., Young v. United States*, 481 U.S. 787, 814 (1987) (refusing to apply non-constitutional harmless error analysis where an interested prosecutor was appointed).

After suffering delays ranging from two years, two months to seven years, two months (and an average of four years, three months) the twenty-nine consolidated Petitioners can point to two known causes for the delay in their appeals. First, if their post-trial delay was suffered after their cases were docketed at the NMCCA, the shortage of adequate appellate defense counsel was partly to blame. *Diaz*, 59 M.J. at 38. Second, if their delays were suffered before their cases were docketed, the delay at that level was so systemic that the CAAF implemented rigid standards for processing future cases. *Moreno*, 53 M.J. at 142. In either case, the question of fairness is raised and the need to assuage public concern for the lack of appearance of justice must be alleviated.

The CAAF did seek to alleviate the "appearance of justice" concern but only when addressing the statutory due process test for post-trial delay. In *Toohey II* the CAAF found that the inordinate delay in that case negatively impacted the public's perception. *Toohey II*, 63 M.J. at 362. But the CAAF's finding did not affect its own constitutional due process analysis because the statutory test can only be implemented by service courts. The statutory test is inherent in the service courts' Article 66(c), UCMJ review. The CAAF has stated that the statute "calls for, if anything, even greater diligence and timeliness than is found in the civilian system." *Diaz*, 59 M.J. at 39. Military service courts are required to review an appellant's case and approve only the findings and sentence that "should be approved." Article 66(c), UCMJ. And, if a service court finds excessive post-trial delay, a service court can grant sentence relief without the finding of prejudice. *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

But the statutory test only contains amorphous language that limits service courts to a generalized review of statutory due process violations, without an indication of how to test for those violations or what remedies to apply. *Cf. Zedner v. United States*, 2006 U.S. LEXIS 4509, 126 S. Ct. 1976 (2006) (harmless error not applicable where Speedy Trial Act dictated remedy for violation). Contrastingly, the constitutional due process framework for post-trial delay does set forth a test. And, most important, is directly applicable to the CAAF.

Yet, the "public perception" factor is absent from the CAAF's own constitutional due process review. In *Toohey II*, the CAAF instructed service courts that "tolerating [the delay in appellant's case] would adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. But, the same public perception that the CAAF recognized in a non-constitutional due process test did not factor into its own constitutional due process test.

The fact that an "appearance of justice" is compromised is recognized by the CAAF's finding that there is a public perception problem with post-trial delay. But the CAAF failed to address the issue in its constitutional due process analysis. Instead, the CAAF's novel use of the harmless error doctrine serves to aggravate the public's perception because the harmlessness of Petitioners' due process violations realistically cannot be gauged.

II. A SPEEDY POST-TRIAL DUE PROCESS VIOLATION REQUIRES THE APPLICATION OF A REMEDY ONCE A VIOLATION IS FOUND.

All federal circuit and district courts, once they have found a violation of the due process right to a speedy appeal, end the analysis and immediately focus on a remedy for the constitutional violation. *Simmons*, 44 F.3d at 1170-71 (granting relief for thirteen-year delay between conviction and direct appeal); *Ward v.*

Freeman, 1995 U.S. App. LEXIS 2304 at 5 (granting relief for fifteen-year delay between conviction and direct appeal); *Simmons*, 898 F.2d at 868 (allowing Appellant to pursue damages under 42 U.S.C § 1983 for six-year delay between conviction and direct appeal); *Brooks v. Jones*, 875 F.2d 30, 31 (2d Cir. 1989) (granting relief for eight-year delay between conviction and direct appeal); *Burkett v. Cunningham*, 826 F.2d 1208, 1225 (3d Cir. 1987) (granting relief for six-year delay between conviction and direct appeal); *Mathis v. Hood*, 1990 U.S. Dist. LEXIS 8474, 5, 24 (S.D.N.Y. 1990) (granting relief for six-year delay between conviction and direct appeal), *aff'd* 937 f.2d 790 (2d Cir. 1991); *Washington v. Sobina*, 387 F. Supp. 2d 460, 474, 476-77 (E.D. Pa. 2005) (granting relief for six- year delay between conviction and direct appeal); *Brown v. Costello*, 2004 U.S. Dist. LEXIS 16159, 11 (S.D.N.Y. 2004) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for six-year delay between conviction and direct appeal); *Collins v. Rivera*, 1999 U.S. Dist. LEXIS 20704, 19 (W.D.N.Y. 1999) (granting relief for a two-year delay between conviction and direct appeal); *Serrano v. Portuondo*, 1999 U.S. Dist. LEXIS 10216, 12-14, 17-18 (S.D.N.Y. 1999) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for a fifteen-year delay between conviction and direct appeal); *Cameron v. Lefevre*, 887 F. Supp. 425, 434-35 (E.D.N.Y. 1995) (granting relief for four-year delay between conviction and direct appeal); *Einaugler v. Dowling*, 862 F. Supp. 793, 800-01 (E.D.N.Y. 1994) (granting relief for thirteen-month delay between conviction and direct appeal); *Wallace v. Leonardo*, 827

F. Supp. 150, 158 (W.D.N.Y. 1993) (allowing Appellant to pursue damages under 42 U.S.C § 1983 for a delay of eleven years and three months between conviction and direct appeal); *Hampton v. Kelly*, 1988 U.S. Dist. LEXIS 13999, 4-6 (E.D.N.Y. 1988) (granting relief for a thirty-nine month delay between conviction and direct appeal), *appeal dismissed*, 876 F.2d 890 (2d Cir. 1989); *Jacob v. Henderson*, 1987 U.S. Dist. LEXIS 14137, 7-8 (E.D.N.Y. 1989) (granting relief for a two and a half year delay between conviction and direct appeal).

The remedies considered by the courts above are usually limited, that is they fall short of the sole constitutional remedy for a violation of the Sixth Amendment speedy trial right – dismissal of the indictment. *See Strunk*, 412 U.S. at 439-40. Nonetheless, the remedies employed by the district and circuit courts serve both to reinforce society's perception that the appellate process is fair, timely and legitimate, and to ensure that longstanding patterns of delay are not repeated.

The CAAF's orders and reasoning for denying Petitioners immediate relief, despite finding a constitutional due process violation in their cases, stands in contrast to other jurisdictions. The barrier to relief for Petitioners is the CAAF's use of the harmless error doctrine.

In rare cases, such as *Toohey II*, the harmless error standard has not hindered relief. But most often it does. Even in some cases where a due process violation has

been found to not be harmless beyond a reasonable doubt, the CAAF has refused to remedy the violation out of concern that "to fashion relief that would be actual and meaningful . . . would be disproportionate to the possible harm generated from the delay." *United States v. Rodriquez-Rivera*, 63 M.J. 372, 386 (C.A.A.F. 2006). Thus, appellants cannot hope to gain immediate relief even if they meet the more stringent harmless error test that the CAAF has designed. Now a showing that meaningful relief will not be disproportionate to the harm suffered must be made.

If the appellate rights of military service members are to comport with the requirements of constitutional due process, the redundancies and inefficiencies that CAAF has introduced through its strained analysis cannot exist. Instead, immediate relief must be provided once a post-trial delay due process violation is determined.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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